Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

RICHARD VITI,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 22, 1994

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QUESTIONS PRESENTED

I. May the government require the subject of an Internal Revenue Service criminal investigation to file income tax returns when the act of filing, and the information revealed, will be incriminating?

LIST OF PARTIES

Petitioner

Bruce S. Harvey, Attorney, (Appointed by the District Court, Northern District of Georgia, to represent Petitioner at trial and on appeal to the United States Court of Appeal for the Eleventh Circuit)

Richard Viti, Petitioner

Respondent

Gerrilyn G. Brill, United States Attorney, Northern Dist. of Ga.

Bryan J. Farrell, Assistant United States Attorney, Northern Dist. of Ga.

Robert P. Marcovitch, Assistant United States Attorney, Northern Dist. of Ga.

David E. McClernan, Assistant United States Attorney, Northern Dist. of Ga.

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IN THE

Supreme Court of the United States

December Term, 1994

RICHARD A. VITI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

The Petitioner, *Pro Se*, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled proceeding on June 2, 1994, affirming Petitioner's conviction; and October 18, 1994, denying his Petition For Rehearing and Suggestion of Rehearing *En Banc*.

OPINIONS BELOW

The opinions of the Court of Appeals for the Eleventh Circuit are included in the Appendix and are as follows:

Conviction Affirmed (June 2, 1994):

United States of America v. Viti, 25 F.3d 1061 (11th Cir. 1994)

Petition for Rehearing and Suggestion of Rehearing *En Banc* Denied (October 18, 1994):

United States of America v. Viti, Case No. 93-8493, (11th Cir. 1994)

There was no published opinion for the District Court. Relevant Orders from the Magistrate and transcripts of orders from the bench in District Court are also included in the Appendix.

JURISDICTION

Jurisdiction of the United States District Court for the Northern District of Georgia to try the case is 18 U.S.C. 3231.

Jurisdiction of the Court of Appeals to review the Judgment of Conviction was invoked under 28 U.S.C. 1291.

Jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. Section 1254(1). The Eleventh Circuit's decision to affirm the conviction was entered on June 2, 1994 and its decision to deny a Petition for Rehearing and Suggestion of *En Banc* Consideration was entered on October 18, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fifth Amendment:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

STATEMENT OF THE CASE

Petitioner (Viti), was charged, in a three count superseding indictment with violating 18 U.S.C. 371 by conspiring to defraud the government by impeding, impairing, defeating, and obstructing the lawful governmental functions of the Internal Revenue Service (IRS) in the ascertainment, evaluation, assessment, and collection of income taxes - during the period of 1983 thru 1986 (Count One).

Counts Two and Three alleged violations of 26 U.S.C. 7201, income tax

evasion, based upon a failure to file and failure to report income for the years 1985 and 1986, respectively.

Count One was severed and Viti was acquitted at trial on July 18, 1991. Viti motioned the district court for dismissal of Counts Two and Three because the tax evasion counts were based on Viti's failure to file and report. Viti claimed that he could not file and report because he had been categorized by the IRS as an "illegal tax protestor" (a class believed by the IRS to be involved in one or illegal schemes that affect the payment of taxes) and as such was under criminal investigation by the IRS as early as February 13, 1984. Because he was under criminal investigation, Viti feared that the act of filing an income tax return for 1985 and 1986 (and the contents of the return) would be used

against him in any pending criminal case, particularly since Viti had failed to file in 1983 and 1984.

The magistrate denied Viti's motion (the only direct written response to the issue raised by Viti); the district court affirmed the denial from the bench. Viti was convicted of Counts Two and Three and the Eleventh Circuit affirmed the conviction and denied a Petition For Rehearing and Suggestion of *En Banc* Consideration without commenting on the issue raised by Viti.

REASON FOR GRANTING THE WRIT

The writ should be granted because the Eleventh Circuit has failed to follow prior decisions of this Court; the issue raised involves the failure to protect and enforce substantial Fifth Amendment Rights; and this Court should not pass on

the opportunity to apply principles of Constitutional Law of historical magnitude.

Counts Two and Three of the Superseding Indictment charged that Viti received taxable income during the calendar years 1985 and 1986. In both Counts, the government alleged:

> ... that upon said taxable income there was due and owing to the United States of America an income tax ... that well-knowing and believing the foregoing facts, Richard Viti ... did willfully attempt to evade and defeat said income tax ... **by failing to make an income tax return** ... as required by law ... (emphasis added).

Viti then, was charged with attempting to evade and defeat the income tax based on his failure to file income tax returns that the government alleges were required by law.

As a result of public disclosures concerning Viti's beliefs with regard to the income tax laws, he was classified

as an "Illegal Tax Protestor" on or before February 13, 1984.

The Illegal Tax Protestor Program is a national project of the Criminal Investigative Division of the Internal Revenue Service. As early as 1980, the IRS defined a "tax protestor" as "a person who employs one or more **illegal schemes** that affect the payment of taxes." [see Handbook for Special Agents (1-18-80) Sec. 445.1] NOTE: For a discussion of IRS activities with regard to "illegal tax protestors", see, *United States v. Amon*, 669 F.2d 1351 (10th Cir. 1981) (In a 2-1 decision, the Tenth Circuit ruled that although the government selects ITP's for prosecution, it was not selective prosecution.)

The IRS's objective in classifying individuals as ITP's is to expedite the review of all information provided by the

individual for prosecutorial potential. See, Handbook for Special Agents (1-18-80) Section 445.3. Therefore, prior to the years 1985 and 1986, Viti was confronted with **substantial and real** hazards of self-incrimination.

This Court has previously held that the information revealed in an income tax return is for Fifth Amendment analysis, the tesitmony of a witness as that term is used therein. *Garner v. United States*, 424 U.S. 648 (1975). In addition, this Court has held that the very **act** of providing information involves testimonial aspects that are to protected by the application of the Fifth Amendment. *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984). Also, see, *United States v. Argomaniz*, 925 F.2d 1349 (11th Cir. 1991).

In instances where the very act of filing may be incriminating or where the individual has a "real and appreciable," and not merely "imaginary and unsubstantial," hazard of self-incrimination by providing information which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt," this Court has ruled that the individual may elect to assert the protections afforded by the Fifth Amendment by not filing any return at all. *Marchetti v. United States*, 390 U.S. 39 (1967).

In *Marchetti*, this Court noted as follows:

> The central standard for the application [of the fifth amendment privilege against self-incrimination is] whether the claimant is confronted by substantial and 'real', and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. United States*, 390 U.S. 39, 53 (1968).

Clearly, that standard applied with

regard to Viti's apprehension regarding the filing of his 1985 and 1986 income tax returns inasmuch as he had failed to file in 1983 and 1984; was considered to be involved in illegal schemes by the IRS; was under investigation by the IRS's Criminal Investigation Division; and was being considered for prosecutorial potential.

Lower courts also noted in that there exists "a legitimate fear of criminal prosecution while an IRS investigation remains in the civil stage, before formal transfer to the criminal division." (Footnote omitted). *Argomaniz* at 1353, citing *United States v. Sharp*, 920 F.2d 1167 (4th Cir. 1990).

The Internal Revenue Service had already targeted Viti for prosecution and had already committed any information, that Viti had provided and would provide

for transfer to the Criminal Investigation Division for use in his prosecution. Viti's concerns were well beyond any concerns that *Marchetti* and *Argomaniz* may have had.

In the instant case, Viti had already advanced beyond the civil stage of any inquiries. Once he was classified as an Illegal Tax Protester, alleged to be involved in criminal wrong-doing involving his income taxes, and targeted for expeditious investigation and prosecution, Viti's only means of preserving his fifth amendment right was to maintain his silence. There can be no question that Viti was confronted by **substantial and real** hazards of incrimination (the validity of the concern is clearly demonstrated by the prosecution of Count One for the period of 1983 to 1986). Any attempts by the government to use the

courts to secure any of the information solicited in the filing of an income tax return would surely have been unsuccessful upon Viti's invocation of the Fifth Amendment.

The government elected to make no inquiry into the reason Viti failed to file his returns for 1985 and 1986. As a result, Viti was not provided with a forum in which he could present his concerns regarding self-incrimination. The Court has a duty to preserve Viti's rights by recognizing that Viti's Fifth Amendment claim is a complete defense to his failing to file in 1985 and 1986. As in *Marchetti*, the only way Viti could preserve the protection afforded by the Fifth Amendment was not to file any return at all. The government has made no attempt to afford the Defendant an *Argomaniz* type hearing and should not now

be allowed to circumvent Viti's Fifth Amendment right not be a witness against himself.

Viti is not suggesting that as a result of the ITP classification the government is precluded from bringing charges of tax evasion, **merely that the basis for the evasion cannot rest on his failure to file.**

Unlike the contention made by the Magistrate, this case was not controlled by *United States v. Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927). *Sullivan* was not identified as an individual involved in illegal schemes that affect the payment of taxes. *Sullivan* was not being scrutinized for prosecutorial potential. And, *Sullivan* was not under criminal investigation.

Since Viti could not have been required to file income tax returns for

the years 1985 and 1986, Counts Two and Three of the Superseding Indictment should have been dismissed. The district court's failure to recognize Viti's clear legal basis for not filing income tax returns for the years in question, makes a mockery of the protections afforded by the fifth amendment and establishes a dangerous precedent for charging an individual with tax evasion based on his refusal to waive the protections afforded by the Fifth Amendment.

In addition, the clear implication of the lower court's decision is that a government agency may suspect an individual of criminal wrong-doing, have the individual under criminal investigation, and still require that individual to provide the agency with incriminating information despite the protections afforded by the Fifth Amendment.

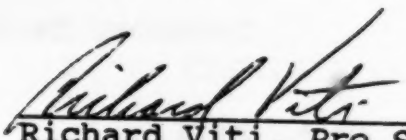
CONCLUSION

The issue raised herein involves a substantial application of individual rights under the Fifth Amendment. Although the specific facts result in an issue of first impression, sufficient precedence from this Court clearly indicates that the district court erred in adopting the magistrate's report and recommendation. Correspondingly, by affirming Viti's conviction, the Eleventh Circuit has failed to follow and apply prior decisions of this Court.

For these reasons, Viti respectfully requests that this Court grant the writ; prevent this injustice; and reverse the Eleventh Circuit's decision to affirm Viti's conviction.

(signature on next page)

Respectfully submitted this 22nd day of November, 1994.



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IN THE

Supreme Court of the United States

December Term, 1994

RICHARD A. VITI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	CRIMINAL CASE
v.	:	NO. 1:91-CR-072-03
RICHARD VITI	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

3. THE MOTION TO DISMISS COUNTS TWO AND THREE

In Count Two of the superseding indictment, filed May 9, 1991 [Doc. 88] the defendant is charged with willfully attempting to evade and defeat the payment of approximately $22,000 income tax due and owing by him to the United States for calendar year 1985 in violation of 26 U.S.C. Sec. 7201. In count three, he is charged with a similar offense for calendar year 1986; and the amount of alleged tax due and owning by him is approximately $19,000.

Apparently, he contends that counts two and three should be dismissed because he knew that he had been targeted as an illegal tax protestor by the Internal Revenue Service's Criminal Investigation Division (CID), and he knew that any tax returns he filed would be scrutinized by CID. As a consequence, his only recourse was to not file returns, which should not subject him to criminal charges.

As noted by the government in its response such allegations are not applicable to the instant charges which allege income tax evasion--not a failure to file returns.[3] Furthermore, defendant's reliance on *Marchetti v. United States*, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889

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[3] This Court recognizes that a willful failure to file a return, coupled with additional affirmation acts to evade and defeat the tax, can support a conviction for income tax evasion. Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943).

(1968); and *Grosso v. United States*, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968) which involved reportable income obtained from illegal gambling have no application to this case which is controlled by *United States v. Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927).

It is THEREFORE, RECOMMENDED that the Motion to Dismiss counts two and three be DENIED.

IT IS SO RECOMMENDED.

This 28th day of December, 1992.

JOEL M. FELDMAN
UNITED STATED MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	CRIMINAL CASE
v.	:	NO. 1:91-CR-072-03
RICHARD VITI	:	

[PRETRIAL CONFERENCE]

Transcript of Proceedings before The Honorable J. Owen Forrester, United States District Judge, at Atlanta, Fulton County, Georgia, commencing on January 19, 1993.

Appearances of Counsel:

For the United States:

DAVID E. MCCLERNAN,
Assistant U.S. Attorney

For the Defendant:

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(The following is a reprint of lines 6-16 on page no. 3 of the transcript. This is the District Court's ruling on the Motion to Dismiss.)

MR. HARVEY: Again, I believe that the subject of the R&R was also a motion to dismiss.

THE CLERK: Bruce, can you give me a date on that report and recommendation?

MR. HARVEY: On the R&R?

THE CLERK: Uh-huh.

MR. HARVEY: December 28, 1992. Do you have it, Judge?

THE CLERK: Is that a copy?

THE COURT: All right. I have reviewed the motions and the responses, and they are all three denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-8493

D.C. Docket No. 1:91cr72-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD VITI,

Defendant-Appellant,

Appeal from the United States District Court for the Northern District of Georgia

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June 2, 1994

Before EDMONDSON and CARNES, Circuit Judges, HENDERSON, Senior Circuit Judge.

PER CUKRIAM: AFFIRMED. See Eleventh Circuit Rule 36-1.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-8493

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD VITI,

Defendant-Appellant,

Appeal from the United States District Court for the Northern District of Georgia

---

October 18, 1994

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before EDMONDSON and CARNES, Circuit Judges, HENDERSON, Senior Circuit Judge.

PER CUKRIAM:

The Petition(s) for Rehearing are

DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE